INDEX

OPINION BELOW 1

JURISDICTION 2

QUESTIONS 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 4

CONCLUSION 9

TABLE OF CASES

Benton v. Maryland, 395 U.S. 784 (1969) 6

Boyle v. Landry, 401 U.S. 77 (1971) 5

Brock v. North Carolina, 344 U.S. 424 (1953) 7

Burris v. Ryan, 397 F. 2d 553 (1968) 7

Downum v. United States, 372 U.S. 734 (1963) 7

Golubin v. United States, 393 F. 2d 590 (1968) 7

Gori v. United States, 367 U.S. 364 (1961) 7

Grogan v. United States, 394 F. 2d 287 (1967) 7

Hernandez v. Nelson,
293 F. Supp. 682 (1968) 7

Howard v. United States,
372 F. 2d 294 (1967) 7

Morgan v. State,
28 Ariz. 363, 236 P. 112 (1925) 7

Oelke v. United States,
389 F. 2d 668 (1967) 7

People v. Bishop,
238 N.Y.S. 2d 107, 38 Misc. 2d
106 (1962) 7

State v. Battle,
267 N.C. 513 (1966) 7

State v. Brock,
234 N.C. 390 (1951) 7

State v. Dove,
222 N.C. 162 (1942) 7

State v. Guice,
201 N.C. 761 (1931) 7

State v. Pfeifer,
256 N.C. 790 (1966) 7

State v. Weaver,
35 N.C. 203 (1851) 7

State v. Woodring,
95 Ariz. 84, 386 P. 2d 851 (1963) 7

Thompson v. United States,
155 U.S. 271 7

United States v. Perez,
22 U.S. (9 Wheat.) 256 (1824) 6

United States v. Perisco,
425 F. 2d 1375 (1970) 8

United States v. Reeves,
293 F. Supp. 213 (1968) 7

Wade v. Hunter,
336 U.S. 684 (1949) 6, 7

Younger v. Harris,
401 U.S. 37 (1971) 4, 5

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1972

No. 72-164

HAYWOOD E. HONEYCUTT,
Petitioner,

-vs-

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The petitioner filed a Motion to Dismiss the charge pending against him in the Superior Court Division, General Court of Justice, Cumberland County, North Carolina, which was denied in an Order entered March 29, 1972, by the Honorable Edward B. Clark, Judge Presiding. Petitioner then filed a petition for writ of certiorari in the Supreme Court of North Carolina which was denied by Order of the Court in conference on May 2, 1972 (No. 66PC, Spring 1972). Copies of the above Orders are appended to the petitioner's petition before this Court.

From the judgment below, petitioner has filed this Petition for a Writ of Certiorari to the Supreme Court of North Carolina in the Supreme Court of the United States.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS

I.

WHETHER THE ISSUE SOUGHT TO BE RAISED IS PROPER FOR CONSIDERATION BY THIS COURT?

II.

WHEN THE DEFENDANT'S FIRST TWO TRIALS HAVE BEEN DECLARED MISTRIALS FOR FAILURE OF THE JURORS TO REACH A VERDICT, IS A THIRD TRIAL BARRED BY VIRTUE OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

Amendment V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV.

§ 1. All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The following proceedings arose in the Superior Court of Cumberland County, North Carolina. The petitioner was charged on July 30, 1969, with the capital offense of murder, and was granted bail on July 31, 1969. Honeycutt was indicted for murder in the first degree on August 11, 1969. He was tried for that offense at the November 9, 1970 Criminal Session of Cumberland County Superior Court, and when the jury was unable to reach a unanimous verdict after lengthy deliberation, a mistrial was ordered by the presiding judge.

At the January 4, 1971 Criminal Session of Cumberland County Superior Court, the petitioner was tried again for first degree murder. After another lengthy trial and exhaustive deliberation by the jury, a mistrial was ordered by the presiding judge after the jury was unable to reach a verdict. As found by the court below, "(t)he jury deliberated an afternoon, in evening session until 11 o'clock, p.m. and the following morning until approximately 12 o'clock, Noon."

The State of North Carolina recalendared the case for trial for the week of September 28, 1971, and at the petitioner's request, the case was continued until after November 15, 1971, to provide him an opportunity to complete his farming operation. The State then calendared the case for a third trial to be held on April 4, 1972. On March 24, 1972, petitioner moved the court to have the charge dismissed on the ground that a third trial violated his rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment. This motion was denied by the Honorable Edward B. Clark, Judge Presiding, by Order entered March 29, 1972. A motion for continuance pending appellate review was

granted by the presiding judge on March 29, 1972, the Order specifying that review was to be directed to the Supreme Court of North Carolina.

A petition for writ of certiorari was filed in the Supreme Court of North Carolina on April 11, 1972, contending that the petitioner's rights had been violated under the Double Jeopardy Clause. The petition for writ of certiorari was denied by Order of the Supreme Court of North Carolina in conference on May 2, 1972.

From the Order of the Supreme Court of North Carolina denying relief, the petitioner now seeks the issuance of the writ of certiorari by the Supreme Court of the United States.

ARGUMENT

I.

THE ISSUE SOUGHT TO BE RAISED IS NOT PROPER FOR CONSIDERATION BY THIS COURT.

The petitioner entered a motion to dismiss the charge against him in the Superior Court of Cumberland County which he requested be treated as a plea in bar. Upon denial of relief, petitioner obtained a continuance pending appellate review by the Supreme Court of North Carolina. The petitioner is in effect now requesting this Court to enjoin the courts of the State of North Carolina from bringing him to trial upon this charge of murder in the first degree.

In the recent case of *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court handed down guidelines regarding intervention by federal courts in state criminal prosecutions. "What the concept (federalism) does represent is a system in which there is sensitivity to the legitimate interest of both State and National Governments, and in which the National Government, anxious though it may be to vendicate and protect federal rights and federal interest, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future." 401 U.S., at 44-45.

Enjoining the State from prosecuting the petitioner upon the charge against him would contravene the philosophy of this Court's opinion in *Younger*. "(T)he normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. The policy of a century and a half against interference by the federal courts with state law enforcement is not to be set aside on such . . . allegations as those relied upon here." *Boyle v. Landry*, 401 U.S. 77, 81 (1971).

The petitioner is being placed on trial for a third time upon the charge of murder in the first degree after two previous juries had been unable to reach a verdict. To predict the outcome of this third trial would be mere speculation. The case might be dismissed upon some technicality or the jury return a verdict of not guilty, which would eliminate the necessity of presenting this alleged claim of constitution deprivation to the federal courts. If the defendant were convicted by the jury, the double jeopardy issue could be presented upon appeal. The normal course of this State's criminal prosecution should not be blocked in the present case.

The Respondent contends that the petitioner has failed to show any threat to his federally protected rights which cannot be eliminated by his defense against the criminal prosecution, or that he has shown irreparable injury that is both great and immediate. Therefore, the Respondent contends that this Court should refrain from enjoining the State of North Carolina from prosecuting the petitioner upon the charge against him.

II.

IF A DEFENDANT'S FIRST TWO TRIALS HAVE BEEN DECLARED MISTRIALS FOR FAILURE OF THE JURORS TO REACH A VERDICT, A THIRD TRIAL IS NOT BARRED BY VIRTUE OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

The Double Jeopardy Clause in the Fifth Amendment of the Constitution which reads " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," has been held applicable to the states through the Fourteenth

Amendment, *Benton v. Maryland*, 395 U.S. 784 (1969). From an early date the Supreme Court of the United States has held that where a defendant is put on trial and the jury is unable to agree it is not unconstitutional for the accused to be tried again. *United States v. Perez*, 22 U.S. (9 Wheat.) 256 (1824).

In *Wade v. Hunter*, 336 U.S. 684 (1949), this Court stated:

> "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices in which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial, making its completion impossible, such as a failure of a jury to agree on a verdict. In such event that purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again . . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." 336 U.S., at 688-689.

The Court in *Wade* interpreted the rule in *Perez* to mean that a trial could be discontinued when particular circumstances manifested a necessity for doing so, and when failure to discontinue would defeat the ends of justice. 366 U.S., at 690. The Cumberland County Superior Court below found that a mistrial was ordered by the Court in both of the petitioner's two prior trials "after a lengthy and exhausting trial and many hours of deliberation by the jury." The Respondent contends that the "public's interest in justice" requires that the petitioner be tried upon the charge against him after the two previous mistrials.

It has long been the common law rule in this State that double jeopardy does not attach because the trial court has the discretion

to declare a mistrial and require the defendant to be presented before another jury if it be in the interest of justice to do so. *State v. Brock*, 234 N.C. 390 (1951); *State v. Dove*, 222 N.C. 162 (1942); *State v. Guice*, 201 N.C. 761 (1931); *State v. Weaver*, 35 N.C. 203 (1851). The action of the trial court in ordering a mistrial, in the exercise of its discretion, will not support a plea of former jeopardy in a subsequent prosecution. *State v. Battle*, 267 N.C. 513 (1966); *State v. Pfeifer*, 256 N.C. 790 (1966).

"This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will best be served. *Wade v. Hunter*, 336 U.S. 684; *Thompson v. United States*, 155 U.S. 271, 273-274." *Brock v. North Carolina*, 344 U.S. 424, 427 (1953). Also see *Gori v. United States*, 367 U.S. 364 (1961); and *Downum v. United States*, 372 U.S. 734 (1963). In *People v. Bishop*, 238 N.Y.S. 2d 107, 38 Misc. 2d 106 (1962), the defendant had two prior trials on criminal charges result in mistrials by reason of the inability of the jury to agree. The court allowed the case to be sent back for retrial. "When the jury disagreed here, such disagreement was in law no trial at all." 238 N.Y.S. 2d, at 111.

"Just as in the case of a retrial of a defendant after his reversal on appeal of a prior conviction, a trial following a mistrial does not raise the issue of double jeopardy." *United States v. Reeves*, 293 F. Supp. 213, 214 (D.C.D.C. 1968). "(E)ven though the first 'trial' placed defendant in jeopardy, he cannot claim, after a mistrial, that he was placed in double jeopardy by the subsequent proceeding." 293 F. Supp., at 214. Also see *Burris v. Ryan*, 397 F. 2d 553 (1968); *Grogan v. United States*, 394 F. 2d 287 (1967); *Golubin v. United States*, 393 F. 2d 590 (1968); *Oelke v. United States*, 389 F. 2d 668 (1967); *Howard v. United States*, 372 F. 2d 294 (1967).

In the case of *Hernandez v. Nelson*, 293 F. Supp. 682 (1968), the court held that jeopardy did not attach following any of three mistrials in a state prosecution for illegal sale of heroin. And in *State v. Woodring*, 95 Ariz. 84, 386 P. 2d 851 (1963), the court held that when a judge declares a mistrial for failure of the jury to reach a verdict, jeopardy does not attach and "there is no limit to the number of trials but the discretion of the court", 386 P. 2d, at 852, citing *Morgan v. State*, 28 Ariz. 363, 236 P. 112 (1925),

where the defendant was prosecuted for murder after two mistrials. The court found no deprivation of constitutional rights in *United States v. Perisco*, 425 F. 2d 1375 (1970), when the defendants were tried a fifth time after four previous trials for the same offense.

Being brought to trial after two previous mistrials is not such an overreaching and oppressive prosecution that the courts should prohibit. The petitioner attempts to draw a line between one and two mistrials, alleging that a defendant might be retried after one mistrial but not after two mistrials. Such a rigid demarcation is not possible. A particular number of trials for the same offense does not necessarily result in deprivation of the defendant's constitutional rights. This decision has first been made by the trial court. The Respondent contends that on the record in the present case the petitioner has failed to show any abuse of discretion in the trial judge's ruling.

CONCLUSION

The Respondent respectfully requests that for the above reasons that the petition for writ of certiorari be denied.

Respectfully submitted,

ROBERT MORGAN
Attorney General of
North Carolina

JACOB L. SAFRON
Assistant Attorney General
A Member of the Bar of the
Supreme Court of the United States

EDWARD L. EATMAN, JR.
Assistant Attorney General

Counsel for the State of
North Carolina, Respondent

Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone (919) 829-7188